CRIMINAL ISSUES IN IMMIGRATION LAW

I. OVERVIEW

The Immigration and Nationality Act includes serious consequences for non-citizens convicted of various crimes. Conviction of a crime defined as an aggravated felony, for example, triggers deportation or removal proceedings, and precludes eligibility for many forms of discretionary relief. The 1996 amendments to the INA also eliminated direct judicial review of final orders of deportation and removal based on certain enumerated criminal offenses.

II. JUDICIAL REVIEW

A. Petition-For-Review Jurisdiction Under the Permanent Rules

The IIRIRA permanent rules apply to removal proceedings initiated by the former INS on or after April 1, 1997. The permanent rules limit petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. Section 1252(a)(2)(C) of Title 8 provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

The enumerated criminal offenses include the criminal grounds of inadmissibility, 8 U.S.C. § 1182(a)(2), and the following criminal grounds of deportability: conviction of an aggravated felony at any time after admission, 8 U.S.C. § 1227(a)(2)(A)(iii), controlled substance convictions and drug abuse 8 U.S.C. § 1227(a)(2)(B), certain firearm offenses, 8 U.S.C. § 1227(a)(2)(C), miscellaneous crimes, 8 U.S.C. § 1227(a)(2)(D), and two or more crimes involving moral turpitude, not arising out of a single scheme of

criminal misconduct, 8 U.S.C. § 1227(a)(2)(A)(ii), for which both crimes carry possible sentences of one year or longer, 8 U.S.C. § 1227(a)(2)(A)(i).

The term "criminal offense" does not include drug addiction. *See Pondoc-Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001) (holding under the transitional rules that drug addiction cannot be considered a "criminal offense" for purposes of removing jurisdiction).

B. Limits on Section 1252(a)(2)(C)

1. Applicant Must be Charged With and Found Removable Based on Enumerated Crime

This court has held that the jurisdiction-stripping provision in section 1252(a)(2)(C) applies only where the agency has determined that the petitioner is removable based on one of the enumerated criminal grounds. *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003) (holding that the court retained jurisdiction where the agency could have found applicant removable on a covered criminal ground, but did not); *Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (holding that the court was not divested of jurisdiction where the petitioner was not charged with or found removable on an enumerated criminal ground, and the INS raised the conviction for the first time before the court of appeals); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) ("[T]he INS' mere allegation that a crime was committed is insufficient to bar appellate jurisdiction" under the transitional rules.); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (rejecting INS argument that commission of an aggravated felony would be sufficient to bar jurisdiction even if the INS did not charge a felony in the order to show cause).

However, where the agency orders the applicant deported on the basis of a criminal ground, but the charging document fails to characterize the crime as an aggravated felony, the jurisdiction-stripping provision still applies. *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (transitional rules).

2. Jurisdiction to Determine Jurisdiction

The court retains jurisdiction to determine its own jurisdiction. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). "In other words, courts retain jurisdiction to address three threshold issues: whether [the petitioner] is [1] an alien, [2] *removable*, and [3] removable because of a conviction for a qualifying crime." *Zavalleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotations omitted); *see also Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reviewing equal protection challenge to the definition of conviction); *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) (retaining jurisdiction to review claim that petitioner was not an alien). Often "the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). The court "must investigate the alleged underlying conviction as thoroughly as is necessary to ascertain whether the jurisdictional bar applies." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 879 (9th Cir. 2003).

If the court determines that the applicant has been convicted of an enumerated crime, the court lacks direct judicial review over the petition for review. *See Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001). The elimination of direct review applies to constitutional and other claims. *See e.g., Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (no jurisdiction to review due process and equal protection claims on petition for review); *Flores-Miramontes*, 212 F.3d 1133, 1143 (9th Cir. 2000) (no jurisdiction to review due process and access to the courts claims on petition for review); *Alfaro-Reyes v. INS*, 224 F.3d 916 (9th Cir. 2000). "Because constitutional claims raised by criminal aliens can be raised in habeas corpus proceedings, we have declined to construe the statute so as to permit direct review by this Court." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 878-79 (9th Cir. 2003).

3. Habeas Corpus Jurisdiction Remains

Where direct judicial review is unavailable over final orders of deportation or removal, a petitioner may file a petition for habeas corpus in district court under 28 U.S.C. § 2241. *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that AEDPA and IIRIRA did not repeal habeas corpus jurisdiction).

For a more information on § 2241 habeas petitions, *see* Immigration

Habeas Proceedings.

4. IIRIRA Transitional Rules

For deportation and exclusion cases in the pipeline before the effective date of IIRIRA, certain transitional rules apply. Where the final agency order was entered on or after October 31, 1996, and the former INS initiated deportation proceedings before April 1, 1997, proceedings continue to be governed by 8 U.S.C. § 1105a(a), as modified by the transitional changes in judicial review. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Section 309(c)(4)(G) of the IIRIRA transitional rules provides:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

This jurisdictional provision eliminates petition-for-review jurisdiction where an applicant is inadmissible or deportable by reason of having committed an enumerated criminal offense. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1135 (9th Cir. 2000); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). The court "retain[s] jurisdiction, however, to determine whether [an applicant] has committed a deportable offense described in section 309(c)(4)(G)." *Cardenas-Uriarte*, 227 F.3d at 1135.

5. Pre-IIRIRA Changes

For information on the earlier jurisdictional changes made by section 440(a) of the AEDPA in April 1996, *see Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996) (affirming the constitutionality of section section 440(a), and

holding that it applied retroactively to pending cases); *Elramly v. INS*, 131 F.3d 1284, *as amended on denial of rehearing*, (9th Cir. 1997) (per curiam); *Abdel-Razek v. INS*, 114 F.3d 831 (9th Cir. 1997).

III. DEFINITION OF CONVICTION

IIRIRA amended the INA to define a conviction as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A); *Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728, 741-42 (9th Cir. 2000).

A. Finality

"A criminal conviction may not be considered by an IJ until it is final." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993). A conviction is final for immigration purposes "[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled." *Id*. (internal quotations omitted).

B. Pre-Trial Diversion

Participation in a pre-trial diversion program, where no guilty plea has been entered, does not constitute a conviction. *See Paredes-Urrestarazu v INS*, 36 F.3d 801 (9th Cir. 1994) (arrest and participation in California pretrial diversion program did not constitute a conviction, but the event could be considered for discretionary purposes); *see also Matter of Grullon*, 20 I. & N. Dec. 12 (BIA 1989) (finding, pre-IIRIRA, no conviction where alien participated in a pretrial intervention program and no guilty plea had been entered).

C. Juvenile proceedings

The BIA has held that juvenile delinquency and youthful offender adjudications do not constitute convictions under the INA. *See In Re Devison*, 22 I. & N. Dec. 1362 (BIA 2000) (en banc).

D. Post-Conviction Relief

1. Reversed Convictions

A conviction overturned on the merits may not be used as the basis for a deportation order. *See e.g.*, *Lujan-Armendariz v. INS*, 222 F.3d 728, 746-47 & n.30 (9th Cir. 2000) (suggesting that "a reversed conviction is of no force" under the INA); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990).

2. Expunged Convictions

After the incorporation of the definition of conviction in the INA, the Ninth Circuit has held that expungement of a state conviction does not eliminate the immigration consequences of that conviction. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (holding that an expunged conviction for lewdness with a child still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (holding that an expunged theft conviction still qualified as an aggravated felony).

a. Exception for Minor Drug Offenses

However, in the Ninth Circuit, first convictions for simple drug possession may be expunged. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Less serious offenses such as possession of paraphernalia also may be expunged. *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000) (remanding for determination of whether applicant qualified for federal first offender treatment); *see also Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reversing, on equal protection grounds, BIA's refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment in the United States); *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) (holding that the BIA's

refusal to recognize state expungement for first time marijuana possession violated applicant's right to equal protection); *cf. Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994) (holding that individuals who could not have benefited from federal first offender treatment were not entitled to receive favorable immigration treatment, even if they qualified for rehabilitation under state law).

3. Writ of Audita Querela

A state court vacatur of a drug conviction pursuant to a writ of *audita querela* does not eliminate the immigration consequences of that conviction. *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998) (noting that petitioner did not identify a "new defense or legal defect in his conviction," and he "requested that the conviction be set aside solely in order to prevent deportation and the subsequent hardship to himself and his family").

IV. DEFINITION OF SENTENCE

Under the INA, "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B).

A. One-Year Sentences

A sentence of "at least one year" means a sentence of 365 days or more. *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001); *Bayudan v. Ashcroft*, 298 F.3d 799 (9th Cir. 2002) (order vacating previous dismissal for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony).

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909-10 (9th Cir. 2000); *accord United States v. Pimentel-Flores*, No. 02-10353, 2003 WL 21883944 (9th Cir. Aug. 11, 2003).

B. Enhancements Not Included

In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the court held that separate recidivist sentencing enhancements may not be taken into account when determining the maximum possible sentence for an offense. *Id*. at 1209-11. In *Corona-Sanchez*, the defendant received a two-year sentence for his conviction for petty theft with a prior. However, the court held that his conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *Id*.; *see also United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (holding that second Arizona drug conviction did not constitute an aggravated felony for sentencing purposes after eliminating recidivism enhancement).

C. Wobblers

When evaluating a state offense punishable as either a felony or a misdemeanor, the BIA is bound by the state court's designation of the offense as a misdemeanor. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); *see also LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) (holding that an undesignated probationary sentence may not be considered a sentence for the maximum period).

D. Probation Violations

A two-year term of imprisonment imposed after revocation of probation is a "term of imprisonment of at least one year." *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (holding that defendant in unlawful reentry case was convicted of a prior aggravated felony even though he was initially sentenced only to probation), *cert. denied*, 534 U.S. 1151 (2002).

V. ANALYZING SPECIFIC CRIMES

A. Standard of Review

This court reviews de novo whether a state or federal conviction is a relevant immigration offense. *See Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (reviewing de novo whether federal conviction was a deportable offense).

B. Categorical Approach

To determine whether specific crime falls within a particular immigration category (i.e., aggravated felony, crime of moral turpitude, or crime of violence) the court must "make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *Chang v. INS*, 307 F.3d 1185 (9th Cir 2002) ("[A]n offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statue falls within the meaning of that term.") (internal quotations omitted).

The court looks "only to the fact of conviction and the statutory definition of the prior offense." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003) (internal quotations and citation omitted). In other words, the categorical definition is based on the elements of the statute, not the defendant's conduct. *See Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) ("We do not . . . look to the particular facts underlying the conviction.").

If the statute is overly inclusive, by criminalizing conduct that would not fall within the generic definition of the crime, the conviction will not facially qualify as an aggravated felony or other relevant immigration offense. *See Chang v. INS*, 307 F.3d 1185 (9th Cir 2002).

C. Modified Categorical Approach

If the statute is "divisible," i.e., broader than the generic definition of the crime, the court conducts a modified categorical analysis. *See id.* Under this approach, the court will "consider whether documentation or other judicially noticeable facts in the record indicate that [the applicant] was convicted of the elements of the generically defined crime." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002) (stating that the court will "conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive").

See Record of Conviction, below.

D. Record of Conviction

"[C]harging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction" under the modified categorical approach. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). "Charging papers alone are never sufficient," but "may be considered in combination with a signed plea agreement." *Corona-Sanchez*, 291 F.3d at 1211 (internal citation omitted); *see also United States v. Taylor*, 495 U.S. 575, 601 (1990) (noting the "practical difficulties and potential unfairness of a factual approach," rather than a categorical approach, to a defendant's prior offenses); *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (en banc) (remanding for review of record of conviction).

1. Probation or Presentence Reports

In *Corona-Sanchez*, the court held that the defendant's presentence report, which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the generic definition of a crime. *Id*. at 1212 (declining to decide whether information in a presentence report from "an identified, acceptable source" can constitute evidence under the modified categorical approach); *see also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (declining to decide whether a court may consider statements in a brief under the modified categorical approach). However, in *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002), the court allowed the presentence report to prove amount of loss in a fraud case where applicant did not contest the factual issues in the report).

In *Chang v. INS*, 307 F.3d 1185 (9th Cir 2002), the court noted the "noticeable tension in our recent caselaw concerning whether the INS may ever rely on presentence reports to develop the factual basis of a convicted offense." *Id*. (holding that the BIA erred when it relied on the PSR because applicant's plea agreement specified the amount of the loss).

E. Applicability of Criminal Sentencing Cases in the Immigration Context

The Ninth Circuit has not explicitly held that circuit rulings in the criminal context necessarily control decisions in the immigration context across the board. However, in *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003), the court held that for purposes of determining whether a crime constituted the aggravated felony of sexual abuse of a minor, a prior Ninth Circuit criminal case was controlling, *see id*. at 1066-67 (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), *cert. denied*, 531 U.S. 1167 (2001)); *see also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 n.2 (9th Cir. 2000) ("[W]e have never even suggested that we would interpret 18 U.S.C. § 924(c)(2) differently in applying the Immigration and Nationality Act than we now interpret it in applying the Sentencing Guidelines."), *cert. denied*, 531 U.S. 1102 (2001).

The Ninth Circuit has applied criminal cases in a number of immigration cases, including:

Huerta-Guevara v. Ashcroft, 321 F.3d 883 (9th Cir. 2003) (applying generic definition of "theft offense" adopted in *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc)); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (same); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (applying generic definition of "theft offense" adopted in *United States v. Corona-Sanchez*, and citing criminal cases for description of the categorical approach); *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (citing criminal cases for description of the categorical approach); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of "crime of violence" from sentencing case); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (applying construction of crime of violence from criminal case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1135 n.5 (9th Cir. 2000) (applying the uniform definition of "burglary" in the Career Criminals Amendment Act, and citing criminal cases for description of the categorical approach).

VI. AGGRAVATED FELONIES

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). An applicant is deportable or removable if convicted of an aggravated felony at any time after admission. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133 (9th Cir. 2001) (holding that "admission" includes adjustment of status). Aggravated felons are also denied direct judicial review from a final order of removal or deportation, *see Aragon-Ayon v. INS*, 206 F.3d 847, 850 (9th Cir. 2000), and are disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal, *United States v. Corona-Sanchez*, 291 F.3d 1201, 1210 n.8 (9th Cir. 2002) (en banc). Moreover, convictions for aggravated felonies trigger mandatory detention without bond, *see Demore v. Kim*, 123 S. Ct. 1708 (2003), and a conviction for illegal reentry under 8 U.S.C. § 1326 will carry a significantly higher federal prison term if the defendant was previously convicted of an aggravated felony. *See* 8 U.S.C. § 1326(b)(2).

A. Increasingly Broad Definition

The aggravated felony category was created by the Anti-Drug Abuse Act of 1988, and included drug trafficking, arms trafficking, murder, and any conspiracy to commit those acts. *United States v. Andrino-Carillo*, 63 F.3d 922, 925 (9th Cir. 1995).

The Immigration Act of 1990 added more aggravated felonies, including "illicit trafficking" in a controlled substance, money laundering, and crimes of violence for which the term of imprisonment imposed was at least five years. *Id*.

New aggravated felonies were added by the Violent Crime Control and Law Enforcement Act of 1994, the Immigration and Nationality Technical Corrections Act of 1994, and section 440(e) of the Antiterrorism and Effective Death Penalty Act of 1996.

1. IIRIRA Amendments

Section 321 of IIRIRA again expanded the list of crimes defined as "aggravated felonies." *See e.g. United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to

trigger 'aggravated felony' status for burglary from five years to one year."); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (IIRIRA added new offenses and "dramatically broadened the definition's reach by expanding the terms of many offenses already denominated aggravated felonies.") (internal quotations omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C.§ 1101(a)(43) (definition of aggravated felony).

2. Retroactive Application

The expended definition of aggravated felony applies "retroactively to all defined offenses whenever committed, and to make aliens so convicted eligible for deportation notwithstanding the passage of time between the crime and the removal order." *Aragon-Ayon v. INS*, 206 F.3d 847, 853 (9th Cir. 2000). The new definition applies to all "actions taken" by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *Id*. at 852 (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)); *but cf. INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that the elimination of discretionary relief based on the expanded aggravated felony definition had an impermissible retroactive effect on certain aliens).

B. Theft & Burglary

A theft or burglary offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the term of imprisonment is at least one year. *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the court adopted the following generic definition of theft offense: "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id*. at 1205 (holding that a California conviction for petty theft with a prior did not facially constitute an aggravated felony because the statute was over-inclusive, and because the maximum possible sentence was less than one year).

The critical aspect of the generic definition of theft is "the criminal intent to deprive the owner." *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th

Cir. 2003). Aiding and abetting theft does not constitute theft for purposes of the aggravated felony definition. *Corona-Sanchez*, 291 F.3d at 1207-08 (noting that "[u]nder California law, aiding and abetting liability is quite broad, extending even to promotion and instigation.").

A burglary offense is "the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

1. Cases Addressing Theft & Burglary Offenses

Huerta-Guevara v. Ashcroft, 321 F.3d 883 (9th Cir. 2003) (holding that Arizona conviction for possession of a stolen vehicle does not facially qualify as a theft offense that amounts to an aggravated felony); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (holding that Arizona conviction for theft of a means of transportation is not a theft offense that amounts to an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (holding that federal conviction for possession of stolen mail is a theft offense amounting to an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (holding that Arizona conviction for unlawful use of means of transportation is not a theft offense for purposes of sentencing enhancement); *see also Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that conviction for vehicle burglary is not a burglary or a crime of violence as these terms are used in the definition of aggravated felony).

C. Murder, Rape or Sexual Abuse of a Minor

The offenses of murder, rape and sexual abuse of a minor constitute aggravated felonies. 8 U.S.C. § 1101(a)(43)(A); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (holding that conviction for lewdness with a child under fourteen years of age in violation of Nevada law constitutes sexual abuse of a minor); *United States v. Marin-Navarette*, 244 F.3d 1284 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes), *cert. denied*, 534 U.S. 941 (2001); *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (holding that a California conviction for lewd conduct with a child under the age of 14 is an aggravated felony for purposes of a sentencing

enhancement); *Castro-Baez v. INS*, 217 F.3d 1057 (9th Cir. 2000) (rape is an aggravated felony).

The Ninth Circuit is currently considering whether a state conviction for misdemeanor statutory rape constitutes sexual abuse of a minor. *See e.g., Valdez Camacho v Ashcroft*, No. 01-71517.

D. Fraud, Money Laundering, and Counterfeiting

Under 8 U.S.C. § 1101(a)(43)(M)(i), an offense involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony. *See Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (conviction for one count of bank fraud was not an aggravated felony where the loss to the victim, as noted in the plea agreement, was under $10,000); *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002) (convictions for bribery and subscribing to a false tax return involved fraud or deceit and loss over $10,000).

In order for a conviction for money laundering to constitute an aggravated felony under 8 U.S.C. 1101(a)(43)(D), the amount of funds laundered must be over $10,000. *See Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than $10,000). A federal conviction for possession of counterfeit obligations is an aggravated felony under 8 U.S.C. 1101(a)(43)(R). *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000).

E. Firearms Offenses

United States v. Mendoza-Reyes, 331 F.3d 1119 (9th Cir. 2003) (holding that Washington conviction for first degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii)); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(E) for sentencing purposes), *cert. denied*, 534 U.S. 931 (2001); *Valerio-Ochoa v. INS*, 241 F.3d 1092 (9th Cir. 2001) (California conviction for "willfully discharg[ing] a firearm in a grossly negligent manner" is a deportable firearms offense), *cert. denied*, 534

U.S. 821 (2001); *United States v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an "aggravated felony" for purposes of sentencing enhancement).

F. Alien Smuggling

Harboring illegal aliens qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(N) as an offense related to alien smuggling. *See Castro-Espinosa v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001).

VII. CONTROLLED SUBSTANCE OFFENSES

The definition of aggravated felony includes "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18.)" 8 U.S.C. § 1101(a)(43)(B).

Section 924(c) of Title 18 defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

"[T]he Controlled Substances Act defines 'felony' as 'any Federal or State offense *classified* by applicable Federal or State law as a felony (emphasis added).'" *United States v. Robles-Rodriguez*, 281 F.3d 900, 903-04 (9th Cir. 2002) (citing 28 U.S.C. § 802(13)). This court has held for sentencing purposes that a state felony offense could be an aggravated felony, even if it would only be punishable as a misdemeanor under federal law. *See United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000) ("[W]e agree with the six other circuits that have addressed this issue that the term 'felony' as used within § 924(c)(2) refers to crimes denominated as felonies under *either* federal *or* state law."), *cert. denied*, 531 U.S. 1102 (2001).

A. Simple Possession of Controlled Substance

A drug conviction for simple possession will be an aggravated felony only if a potential sentence of more than a year can be imposed by the convicting jurisdiction. *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) (Arizona conviction for drug possession not an aggravated felony because under Arizona Proposition 200, incarceration was not authorized); *cf. United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002) (under Nevada Proposition 36, conviction for first possession was an aggravated felony for sentencing purposes).

B. Expungement of First Possession Conviction

In the Ninth Circuit, first convictions for simple drug possession may be expunged, and will not count as conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *see also* Post-Conviction Relief, above.

C. Solicitation

A generic solicitation offense is not a law related to a controlled substance, and is also not an aggravated felony. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (California conviction for transporting marijuana was not an aggravated felony on its face because the statute punishes solicitation); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona conviction for solicitation to possess cocaine is not a violation of a law relating to a controlled substance, and is therefore not a deportable offense); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not a violation of a law relating to a controlled substance, and was therefore not a deportable offense).

D. Accessory After the Fact

A conviction for being an accessory after the fact to the manufacture of methamphetamine is an aggravated felony. *See Olivera-Garcia v. INS*, 328 F.3d 1083 (9th Cir. 2003) (leaving open the question of whether a conviction solely under the federal accessory after the fact statute would be a violation of law relating to a controlled substance).

E. Drug-Related Crimes

Pazcoguin v. Radcliffe, 292 F.3d 1209 (9th Cir. 2002) (holding that applicant was excludable because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state's law relating to a controlled substance); *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that Arizona conviction for possession of drug paraphernalia was a conviction relating to a controlled substance); *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (conviction for being under the influence of amphetamines is a deportable offense); *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992) (holding that conviction for violation of the Travel Act, was a violation of a law relating to a controlled substance, rendering applicant deportable).

VIII. CRIMES OF VIOLENCE

The definition of aggravated felony includes a "crime of violence" as defined by 18 U.S.C. § 16, for which the term of imprisonment imposed is at least one year. 8 U.S.C. § 1101(a)(43)(F); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). There is an exception for purely political offenses. 8 U.S.C. § 1101(a)(43)(F). "Section 16 of Title 18, in turn, provides that 'crime of violence' means: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Ye*, 214 F.3d at 1133 (quoting 8 U.S.C. § 16).

A. Felony Driving Under the Influence

Felony DUI is not a crime of violence. *See Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (holding that a California conviction for driving under influence with injury to another was not "crime of violence" under federal sentencing law).

B. Battery

United States v. Gonzalez-Tamariz, 310 F.3d 1168 (9th Cir. 2002) (holding that Nevada conviction for battery causing substantial bodily harm, which was classified as a gross misdemeanor under state law, was an aggravated felony under federal sentencing law), *cert. denied*, 123 S. Ct. 1921 (2003); *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001) (noting that applicant's convictions for assaulting his wife and children were crimes of violence within the definition of 18 U.S.C. § 16(a)).

C. Possession of Firearms

In the criminal context, being a felon in possession of firearms is not a crime of violence. *See e.g., United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994) (possession of firearm is not a crime of violence for purposes of career offender status); *see also United States v. Sakahian*, 965 F.2d 740 (9th Cir. 1992) (same); *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993) (possession of firearm is not a crime of violence for purposes of 18 U.S.C. § 924(c)); *cf. United States v. Hayes*, 7 F.3d 144 (9th Cir. 1993) (possession of unregistered sawed-off shotgun is crime of violence for purposes of career offender status).

However, being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(E), the specific firearms provision of the aggravated felony definition. *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under the specific firearms provision of the aggravated felony definition), *cert. denied*, 534 U.S. 931 (2001).

D. Other Cases Interpreting Crimes of Violence

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002) (Arizona conviction for felony child endangerment was not categorically an aggravated felony for enhancement purposes); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (California conviction for involuntary manslaughter constitutes a crime of violence); *see also United States v. Springfield*, 829 F.2d 860, 863 (9th Cir. 1987) (same); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (conviction for entry into a locked vehicle is not a crime of violence); *United States v. Wood*, 52 F.3d 272, 275 (9th Cir. 1995) (Washington conviction for

indecent liberties with minor was a "crime of violence" for purposes of the career offender provision); *United States v. Innie*, 7 F.3d 840, 848-52 (9th Cir. 1993) (holding that being an accessory after the fact to murder for hire was not a crime of violence under federal sentencing law); *United States v. Arrellano-Rios*, 799 F.2d 520, 523 (9th Cir. 1986) (drug trafficking is not a crime of violence under 18 U.S.C. § 924(c)).

IX. CRIMES OF MORAL TURPITUDE

"The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." *Jordan v. De George*, 341 U.S. 223, 232 (1951) (holding that crime of conspiracy to defraud United States of taxes was a crime of moral turpitude). Additionally, "certain crimes necessarily involving rather grave acts of baseness or depravity may qualify as crimes of moral turpitude even though they have no element of fraud." *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir.1995) (internal quotations omitted). For example, "spousal abuse, child abuse, first-degree incest, and having carnal knowledge of a 15-year-old female, all involve moral turpitude." *Id*.

Where an act is only statutorily prohibited, rather than inherently wrong, the act will generally not involve moral turpitude. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong).

A. Fraud Cases

Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000) (holding that convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute crimes of moral turpitude); *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a crime of moral turpitude); *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994) (grand theft is a crime of moral turpitude); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (structuring transaction to avoid currency reporting requirement was not crime of moral turpitude because no intent to defraud).

B. Base or Depraved Acts

Zavaleta-Gallegos v. INS, 261 F.3d 951 (9th Cir. 2001) (conviction for stalking is a crime of moral turpitude); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir.1994) ("Incest . . . involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a 'crime involving moral turpitude.'"); *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is a crime of moral turpitude); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child is a crime of moral turpitude).

C. Other Cases Discussing Crimes of Moral Turpitude

Murillo-Salmeron v. INS, 327 F.3d 898 (9th Cir. 2003) (Simple DUI convictions are not crimes of moral turpitude); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) (Arizona conviction for aggravated driving under the influence is not a crime of moral turpitude); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n. 4 (9th Cir.1995) (crime of malicious mischief was not crime of moral turpitude); *Perez v. INS*, 116 F.3d 405 (9th Cir. 1997) (discussing 1996 amendments to crime of moral turpitude provisions); *United States v. Chu Kong Yin*, 935 F.2d 990 (9th Cir. 1991) (crimes of gambling and criminal intimidation did not necessarily involve moral turpitude).

D. Single Scheme of Criminal Misconduct

See Ye v. INS, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction because the INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (not finding single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (finding single scheme); *see also Alberto-Gonzalez v. INS*, 215 F.3d 906 (9th Cir. 2000) (jurisdiction under the transitional rules not eliminated because second crime of moral turpitude did not have the requisite sentence).

E. Petty Offense Exception

A non-citizen with one crime of moral turpitude is not inadmissible if she meets the petty offense exception. A crime of moral turpitude will meet the petty offense exception where "'the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.'" *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) (citing 8 U.S.C. § 1182(a)(2)(A)(ii)(II)).

X. DOMESTIC VIOLENCE CRIMES

Conviction of a state or federal crime of domestic violence is a new ground of deportation added in 1996 by IIRIRA. *See* 8 U.S.C. § 1227(a)(2)(E)(i). The statute covers "any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." *Id.* The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii).

There is no comparable ground of inadmissibility. The Ninth Circuit has not yet reviewed this ground of removal. *Cf. United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003) (interpreting crime of domestic violence in the context of the federal firearms statute).